IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. 76-1699

LEADERSHIP HOUSING, INC., and LEADERSHIP COMMUNITIES, INC.,
Appellants,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

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MOTION TO DISMISS OR AFFIRM

Appellee moves this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Florida on the grounds that it is manifest that the decision below rests on adequate state grounds and that the question on which this appeal

depends is so insubstantial as to not need further argument.

STATEMENT OF THE CASE

A. STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED AND NATURE OF THE CASE.

This appeal questions the validity of Florida's Income Tax Code, Chapter 220, Florida Statutes.

To facilitate an understanding of the nature of this appeal, it is necessary to refer to the history of certain provisions of the Florida Constitution.

Article IX of the Florida Constitution of 1885 was amended in 1924 by the addition to Article IX of Section 11, which read:

> No tax upon inheritances or upon the income of

> residents or citizens of this State shall be levied by the State of Florida, or under its authority, and there shall be exempt from taxation to the head of a family residing in this State, household goods and personal effects to the value of Five Hundred ($500.00) Dollars.

The above language continued unchanged until the 1968 Constitutional revision. As approved in the general election on November 5, 1968, new Article VII, Section 5, read:

> No tax upon estates or inheritances or upon the income of residents or citizens of the state shall be levied by the state, or under its authority, in the excess of the aggregate of amounts which may be allowed to be credited upon or deducted from any similar tax levied by the United States or any state.

The above-quoted provisions will hereafter be referred to as the "Prohibition."

The terms "residents" and "citizens" in the 1968 version were interpreted by the Florida Supreme Court to extend to corporations protection from income taxation. In re Advisory Opinion to the Governor, 243 So.2d 575 (1971). Thereafter, on November 2, 1971, the following amendment to Article VII, Section 5, was approved in the general election:

> (a) NATURAL PERSONS. No tax upon estates or inheritances or upon the income of natural persons who are residents or citizens of the state shall be levied by the state, or under its authority, in excess of the aggregate of amounts which may be allowed to be credited upon or deducted from any similar tax levied by the United States or any state.
>
> (b) OTHERS. No tax upon the income of residents

and citizens other than natural persons shall be levied by the state, or under its authority, in excess of 5% of net income, as defined by law, or at such greater rate as is authorized by a three-fifths (3/5) vote of the membership of each house of the legislature or as will provide for the state the maximum amount which may be allowed to be credited against income taxes levied by the United States and other states. There shall be exempt from taxation not less than five thousand dollars ($5,000) of the excess of net income subject to tax over the maximum amount allowed to be credited against income taxes levied by the United States and other states.

(c) EFFECTIVE DATE. This section shall become effective immediately upon approval by the electors of Florida.

Under the authority of this amendment, the Florida Legislature enacted Chapter 220, Laws of Florida, entitled the "Florida Income Tax Code," imposing a corporate income tax effective January 1, 1972. The relevant provisions of Chapter 220, supra, are set forth in Appendix "D" to the Jurisdictional Statement. The summarized effect of those provisions can be stated as follows: The Florida Legislature did not include in the Income Tax Code a deduction of any kind for that portion of the gain from the sale of property, otherwise included in federal taxable income, which occurred prior to the date of the constitutional amendment removing the Prohibition from the Florida Constitution. By reason of the absence of any provision permitting such a deduction, appreciation in the value of property which occurred prior

to the amendment is taxed, along with the appreciation in value which occurred after that date. Thus, the clear intent of the Legislature was to include all accretions to value, whether occurring before or after November 2, 1971, in the taxable income from capital gains under the Florida Code. This is conceded by Appellants.

The Appellant, LEADERSHIP HOUSING, INC., is a Delaware corporation, with its principal office located in Broward County, Florida. The Appellant, LEADERSHIP COMMUNITIES, INC., is a Florida corporation, also with its principal office in Broward County, Florida. Both Appellants are admittedly subject to the income tax imposed by Chapter 220, Laws of Florida, and have been subject thereto since the enactment of that

statute. They are referred to hereinafter collectively as "Leadership" or Appellants.

Each of the Appellants is engaged in the business of purchasing, developing and selling land to its customers. They acquired various tracts of land in Florida between the year 1924 and the amendment date. Certain portions of such land were sold by Appellants during the taxable years 1972 and 1973.

B. PROCEEDINGS BELOW

Suit was instituted by Leadership in the Circuit Court of the Seventeenth Judicial Circuit of Florida against the Department of Revenue of the State of Florida. The suit was instituted pursuant to Section 86.021, Florida Statutes, seeking a declaratory judgment and other supplemental relief.

Leadership sought to have the Court declare Chapter 220, Laws of Florida, unconstitutional and void _ab initio_, to the extent that it authorizes a levy of income taxation upon appreciation (whether at the time of its realization or its recognition for Federal income tax purposes), which represents gain in value accrued prior to November 2, 1971, the effective date of the amendment to Section 5 of Article VII, Florida Constitution, authorizing a tax upon the income of corporations.

Upon cross-motions for summary judgment, the trial court granted summary judgment in favor of Leadership and on April 23, 1975, granted an amended final judgment declaring Chapter 220, Laws of Florida unconstitutional under the due process clauses of the Florida Constitution and the Constitution of the United

States. The Department of Revenue, Appellee before this Court, entered a timely appeal to the Supreme Court of Florida. The Florida Supreme Court reversed the trial court and Leadership instituted this appeal.

ARGUMENT

POINT I

THE DECISION BELOW RESTS ON STATE-LAW GROUNDS WHICH ARE ADEQUATE AND ENTIRELY DISPOSITIVE OF ALL ISSUES BEFORE THE SUPREME COURT OF FLORIDA.

On appeal to the Florida Supreme Court, Leadership raised on additional ground to support the trial court's decision holding the Income Tax Code invalid. Leadership asserted that

the Prohibition forever shielded from income taxation appreciation in the value of capital assets as such appreciation arose. Essentially Leadership contended that the term "income," as contained in the Prohibition and as interpreted by Florida decisional law during the existence of the Prohibition, included appreciation in capital, although that appreciation had not been realized as gain by the sale of the capital asset during the pendency of the Prohibition. Leadership contended that any subsequent attempt to tax such previously accrued appreciation was barred by the Prohibition, although repealed.

Thus, the Florida Supreme Court stated the issues before it as follows:

> Appellees asserted first that the constitutional prohibition against

> the taxing of income existing prior to November 2, 1971, precludes the taxation as income of all appreciation in the value of assets accruing prior to that date. Second, the appellees asserted that the levy of an income tax by the State of Florida upon capital appreciation which accrued prior to November 2, 1971, but was realized after that date constitutes harsh, arbitrary, and oppressive taxation in violation of the Due Process Clauses of the Florida and Federal Constitutions.

Department of Revenue v. Leadership Housing, Inc., 343 So.2d 611, 613 (Fla. 1977). It is critical to observe that the first issue turns upon the construction of the word "income" in the repealed Prohibition and upon resolving the question of whether that definition differs from the meaning of "income"

as it has been historically used in federal income tax statutes and, as it is now used in the Florida Income Tax Code. That issue is one completely of state law.

The Florida Supreme Court addressed itself to that issue first and exclusively. Department of Revenue v. Leadership Housing, Inc., supra, at 613, 614 ("The entire issue in this case turns on the meaning of income with respect to capital appreciation.") The court reviewed the authorities on the question and concluded that the term "income" in the repealed Prohibition had the meaning historically given to that term by most authorities:

> " 'Income may be defined as the gain derived from capital, from labor, or from both combined' provided it be understood to include

> profit gained through a sale or conversion of capital assets. . . . Here we have the essential matter: not a gain accruing to capital, not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital . . . and, coming in, being 'derived,' that is received or drawn by the recipient (the taxpayer) for his separate use, benefit, and disposal. That is income derived from property. Nothing else answers the description."

Eisner v. Macomber, 25 U.S. 189, 207-08 (1919). (emphasis in original). See also Helvering v. Griffiths, 318 U.S. 371, 63 S.Ct. 636, 87 L.Ed. 843 (1943); MacLaughlin v. Alliance, Ins. Co. of Philadelphia, 286 U.S. 244, 52 S.Ct. 538, 76 L.Ed. 1083 (1932).

The construction of the term "income" in the decision below thus

disposed of Leadership's contention under the Florida constitution. Since income, as used in the Prohibition did not include bare appreciation, as it accrued, then such capital accretions were not isolated from later taxation when the appreciation was realized as a capital gain through sale or conversion after the Prohibition had been repealed. Having decided the question of construction against Leadership, the Florida Supreme Court addressed the federal question in the following terse passage:

> "The second point asserted by the appellees is their contention that the tax is harsh and arbitrary. Holding as we do that there is no income until realization, this argument is without merit." 343 So.2d 611 at 615 (footnote omitted).

The final paragraph of the opinion below states as follows:

> "We reverse the trial court, uphold the constitutionality of Chapter 220 as it pertains to the taxation of capital gains accruing prior to November 2, 1971, and dissolve the injunctive order issued by the trial court in this cause."

Id. Although the decision below referred to the federal question as having no "merit" and upheld the constitutionality of the Florida Income Tax Code, the structure of the opinion makes it clear that the federal issue need not have been and was not reached on its merits and that the reference to the constitutionality of Chapter 220, Laws of Florida, related to constitutionality under the organic law of Florida.

The operative jurisdiction principle is concisely stated in this Court's decision in Honeyman v. Hanan:

> "It is a well established principle of this Court that before

> we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause." (emphasis added).

300 U.S. 14, 18 (1937). It is clear from decisions of this Court that review will be denied where it is not demonstrated that a decision on the federal ground was necessary to the decision appealed. Flournoy v. Weiner, 321 U.S. 253, 64 S.Ct. 548, 88 L.Ed. 708 (1944). See also Armstrong v. Armstrong, 305 U.S. 568, 76 S.Ct. 629, 100 L.Ed. 705 (1956). The Armstrong decision involved a challenge to the divorce decree of an Ohio court granting alimony. Prior to the Ohio decision, a Florida Court had entered a divorce decree between the

same parties and had specifically decreed that no alimony would be awarded. On appeal, the Ohio decision was challenged as failing to give full faith and credit to the Florida decree. In this Court's opinion, it was found that the decree from Florida, although facially explicit, was ambiguous given the posture of the case before the Florida court. The denial of alimony could have resulted from a determination that an award would be unfair or from a lack of evidence to support a reasonable award. Taking the latter interpretation, the Court avoided the federal challenge and affirmed the Ohio court.

In addition to the above authorities, this Court's decision in Fox Film Corp. v. Muller, 296 U.S. 207 (1935), makes clear that where a decision

on state grounds below removes the necessity for considering the federal question or leaves only a purely formal federal question, review will be denied. That is precisely the situation presented by the appeal at bar.

There are two possible federal issues presented by Leadership's invocation of the due process clause of the Fourteenth Amendment. Firstly, there is raised the contention that the tax in question is excessively retroactive and harsh, being therefore contrary to due process. However, that issue is purely formal. The law has been settled, by decisions of this court and by the great weight of decisions from other tribunals, that a tax which calculates income to include capital gains accruing but not realized prior to the date of enacement of the tax is not unconstitutionally

retroactive. See, e.g., Lynch v. Hornsby, 247 U.S. 339, 38 S.Ct. 543, 62 L.Ed. 1149 (1917); MacLaughlin v. Alliance Ins. Co., supra; Kellems v. Brown, 163 Conn. 478, 313 A.2d 53 (1972); Fullerton Oil Co. v. Johnson, 2 Cal.2d 162, 39 P.2d 796 (1934); Fidelity Trust Co. v. Reeves, 287 Ky. 522, 154 S.W.2d 337 (1941); City Nat'l Bank of Clinton v. Iowa State Tax Comm'n, 102 N.W. 2d 381 (Iowa 1960); Norman v. Bradley, 173 Ga. 482, 160 S.E. 413 (1931); Sweetland v. Franchise Tax Bd., 192 Cal App.2d 316, 13 Cal Rep. 432 (1961); Olivey v. Collector of Revenue, 223 La. 985, 97 So.2d 317 (1958); Tiedemann v. Johnson, 316 A.2d 359 (Me. 1974); Shangri-La, Inc. v. State, 309 A.2d 285 (N.H. 1973). Thus, the basic proposition as established in both state and federal constitutional law is that an increase

in value of property over its acquisition value, when realized by conversion into money or other property, constitutes profit which has been consistently regarded as income and taxable when so realized. In other words, the incident or triggering event of taxation is the realization of the gain by sale or other disposition. The Florida Income Tax Code taxes only those events occurring after the effective date of the Act, January 1, 1972, and is prospective. The measure of the tax is the amount of gain over the initial base value, but as well explained in Kellems v. Brown, supra, this does not constitute retroactivity. The gain on which the tax is imposed, under the concepts clearly recognized by the courts, occurs entirely after the effective date of the Act and the

constitutional amendment. Leadership's attempt to avoid the import of MacLaughlin v. Alliance Ins. Co., supra, Lynch v. Hornsby, supra, and authorities of like ilk cannot be sustained. Brushaber v. Union P.R. Co., 240 U.S. 1 (1916); Southern Pacific Co. v. Lowe, 247 U.S. 330 (1918); Lynch v. Turrish, 247 U.S. 221 (1918), and Lucas v. Alexander, 279 U.S. 573 (1929), cited by Leadership at page 15 of the Jurisdictional Statement, rest entirely on the construction of statutory, not constitutional, limitations.

Lynch v. Hornsby, supra, closely on point, permitting the taxing of capital gains accruing prior to the effective date of the Sixteenth Amendment, is not mentioned in Leadership's Jurisdictional Statement.

Under Fox Film Corp. v. Muller, supra, so purely formal a federal question does not present an appealable issue even if addressed in the state court's decision.

A second federal question ostensibly presented under the due process clause of the Fourteenth Amendment, distinguished from the argument that this tax is retroactive, is that Leadership and other Florida taxpayers were beguiled by the existence of the Prohibition and justifiably relied on prior decisions of the Florida courts enterpreting the term "income" in the Prohibition as including capital appreciation as it arose, so that to now tax appreciation which accrued prior to the repeal of the Prohibition is arbitrary and unfair. That this is the only due process claim which is even remotely

colorable is evident from the number of times the argument is vehemently repeated in the Jurisdictional Statement.

Obviously, however, this latter issue cannot arise unless one first construes the Prohibition in favor of Leadership. Indeed, the federal issue, to arise at all, must be preceded by an interpretation, not only of the Prohibition itself, but of prior Florida case law construing the Prohibition. Thus, it can be seen that the existence of the federal question presented for decision in this appeal pivots upon the solution in Leadership's favor of an antecedent state-law issue; the construction of the Prohibition.

In the Jurisdictional Statement, Leadership attempts to avoid this inexorable point by characterizing the

decision below as itself retroactive, arbitrary and unfair, as an attempt to evade review by this Court. In fact, Leadership attempts to set up an additional federal question for review without formally stating it - that the decision below itself violates due process by somehow retroactively changing the definition of income.

When that argument is made clear, it becomes obvious that Leadership seeks to have this Court review the interpretation of Florida law by the Florida Supreme Court. Moreover, the attempt is made under the guise of presenting a federal question which cannot even arise unless the underlying interpretational issue is decided as Appellant's wish.

This Court must accept the Florida Supreme Court's interpretation of

the term "income" in the Prohibition unless compelling circumstances exist which warrant disregarding it. Guaranty Trust Co. v. Blodgett, 287 U.S. 509 (1933). None exist here. Appellants concede that the meaning of income in the Prohibition as construed by the decision below is not directly in conflict with any prior Florida decision construing the Prohibition. p. 23-24, Jurisdictional Statement. Nevertheless, Appellants strive without avail to demonstrate a conflict between the decision appealed and prior Florida cases on the Prohibition. An examination of the cases cited by Appellants as creating the conflict reveals that none exists.

In State v. Keller, 191 So. 542 (Fla. 1939) (p. 6, Jurisdictional Statement), the court found that a city ordinance imposing a graduated license

on tax attorneys and other professionals calculated upon the amount of net income earned in the preceding year was an income tax and struck it down. However, that decision did not even remotely address the question "What is income?" Much less did it approach the task of defining the meaning of income in respect to capital appreciation. Rather, the sole question for decision was whether the tax, as measured <u>by</u> actual income received was <u>on</u> income in violation of the Prohibition.

In <u>Owens v. Fosdick</u>, 13 So.2d 700 (Fla. 1943) (p. 5, Jurisdictional Statement), the court struck down an intangible property tax as applied to the right of a resident beneficiary of a foreign trust to receive purely interest from the trust. The court found that the tax as applied, was one on income.

However, the nature of the subject taxed clearly met the definition of income articulated in the case at bar. The beneficiary in Owens v. Fosdick, supra, had the right to receive only income generated by and separate from the trust res; no right to invade the res, to have it sold or converted to income was given by the settlor. Thus, the matter of defining income in relation to capital accretions was not before the court in Owens v. Fosdick, supra. Indeed, the case dismisses and distinguishes another Florida decision wherein application of the intangible property tax was upheld because the beneficiary had the right to invade the trust corpus virtually at will in addition to the right to receive income from the trust. If anything, the decision in Owens v. Fosdick, supra, suggests that, all along,

the Florida Courts have understood the distinction between capital growth (property) and income from capital in the form of interest, or in the form of capital gain at the time of sale or conversion of the capital asset. That understanding is entirely supportive of the definition given to income in the decision here on appeal. The same is true of Mahan v. Lummus, 35 So.2d 725 (Fla. 1948) (p. 6, Jurisdictional Statement).

There being no hint that the instant decision below conflicts in any way with prior rulings, this Court must accept the decision appealed from for what it is: a ruling premised upon and concerned with the interpretation of Florida law. The resolution of that interpretation against Appellants concludes the predicate for review of the

federal claim here presented. Given the interpretational ruling below, the federal question never became more than a ghost in the wings, despite Appellant's strenuous protestations that it occupied center stage.

POINT II

THIS APPEAL RAISES NO SUBSTANTIAL FEDERAL QUESTION.

This appeal revolves around this central issue: The question is basically whether the levy of an excise tax on the privilege of doing business in Florida where the incident of taxation is the sale, exchange or other disposition of property, and the measurement of the tax is the amount of gain at the time of sale, exchange or other disposition of the property over the base value at the time of acquisition, is a retroactive tax. If it is not retroactive, then it

obviously is not unconstitutionally retroactive. Appellants are unable to assert any significant direct authority for the proposition that such a tax is retroactive. The Court should keep in mind the basic proposition which has been established in challenges based on the argument of retroactivity for taxes similar in nature to that before the Court here. A clear summary of the law as adopted by the federal courts and virtually all state courts on this issue is well set out in Kellems v. Brown, 163 Conn. 478, 313 A.2d 53 (1972), where the court in dealing with a similar provision stated:

> We find no indication either in the language of the act itself or in its legislative history that the General Assembly intended to adopt any other standard for

taxing capital gain than that employed for federal tax purposes to which standard the act makes specific reference. Only gains realized after December 31, 1970, are taxed under the act. The fact that the amount of the tax depends, among other things, on the cost of the asset which may have been acquired prior to the enactment of the tax does not make the tax retrospective. The tax being imposed at the time of realization of the gain operates only in the prospective manner

* * *

The plaintiffs argue that the act so interpreted violated the due process of law provisions of the United States and Connecticut constitutions. Their argument is, essentially, that a taxpayer's cost basis may have as its origin a transaction or valuation which took place over fifty years ago and thus the tax imposed on the profit resulting from the sale of the asset is not only retroactive but

excessively so and constitutes a denial of due process. This argument, however, disregards the concept of taxation of the realization of the capital gain. While the value of a taxpayer's property may increase over a period of years, he realizes the profit and capital gain only on the sale or exchange of the property. The established concept of capital gain taxation and as it is implemented in the act is that the tax is levied on the dual transaction, not on the gradual accretion in value.

This is consistent with virtually all other authority on the point. _See_ _MacLaughlin v. Alliance Insurance Co. of Philadelphia_, 286 U.S. 244, 52 S.Ct. 538, 76 L.Ed. 1083 (1932). _See also_ _Fullerton Oil Co. v. Johnson_, 2 Cal.2d 162, 168, 39 P.2d 796 (Cal. 1934); _Fidelity Columbia Trust Co. v. Reeves_, 287 Ky. 522, 154 S.W.2d 337

(Ky. 1941); <u>City National Bank of Clinton v. Iowa State Tax Com'n</u>., 102 N.W.2d 381 (Iowa 1960); <u>Norman v. Bradley</u>, 173 Ga. 482, 160 S.E. 413 (Ga. 1931); <u>Sweetland v. Franchise Tax Board</u>, 192 Cal. App.2d 316, 13 Cal. Rep. 432 (1961); <u>Olivey v. Collector of Revenue</u>, 233 La. 985, 99 So.2d 317 (1958); <u>Tiedemann v. Johnson</u>, 316 A.2d 359 (Me. 1974); <u>Shangri-La, Inc. v. State</u>, 309 A.2d 285 (N.H. 1973).

Appellants seek to avoid the obvious jurisdictional impolications of this host of authority by advancing essentially two arguments.

Appellants first content that the instant appeal is factually unique and distinguishable from the overwhelming authority plainly contrary to their position. Appellants argue that, because the impediment to the imposition of an

income tax was contained in a State constitutional provision, somehow this case is sui generis and not controlled by the authorities cited above. In essence, this argument is but one species of the "forewarning doctrine" which Appellants seek to make applicable to this case. However, this argument stands foreclosed both by logic and authority.

As noted in the concurring opinion of Justice Boyd to the decision below, there is no significant distinction to be drawn merely because in this case a state constitutional provision provided an exemption from income taxation, while the other authorities on point involved state statutes. Department of Revenue v. Leadership Housing, Inc., supra, at 615. Both statutes and state constitutional provisions are

subject to change, the only difference being that the latter change more slowly and with more labor. A taxpayer must be presumed to be aware that removal of the exemption in the future is entirely possible. No justifiable reliance on such an exemption can be claimed.

Appellants launch into a discussion of federal estate and gift tax cases ostensibly for the theory that a taxpayer must be "forewarned." The case of Untermyer v. Anderson, 276 U.S. 440, 48 S.Ct. 353 (1928), involved attempts to tax transactions completed prior to the effective date of the relevant statute. The case is not on point here because the Florida Code makes no attempt to tax past transactions.

As for City National Bank of Clinton v. Iowa State Tax Com'n.,

102 N.W.2d 381 (Iowa 1960), the court there supports the position of Appellees.

The case of Milliken v. United States, 283 U.S. 15, 51 S.Ct. 324 (1931), allowed taxation of a completed gift which the donor made in 1916. When the donor died in 1920, the court upheld taxation of the gift (in contemplation of death) under the rates authorized by the Act of 1918 (at rates slightly higher than those of the 1916 Act). This case is no authority whatsoever for the Appellants but, to the contrary, stands simply for the proposition that a tax may legally be imposed on a transaction taking place after the effective date of the statute. The Florida Income Tax Code, as noted, taxes only transactions occurring after January 1, 1972, the effective date of the statute, when each taxpayer

of the State of Florida is charged with knowledge that transactions of the sort involved here will be liable for the tax.

Appellees would have this Court accept the proposition that the Florida Code somehow retroactively taxes the voluntary act of refraining from selling property prior to the taxing statute in reliance on the lack of taxing authority. This contention is eminently unsound and constitutes an attempt to twist the principles of taxation. Appellees were sufficiently forewarned, by the passage of the Florida Code, that <u>future</u> transactions, and <u>only</u> future transactions would be taxed. The notion that the "act of not acting" is in itself a past transaction which may not be retroactively taxed is absolutely without any statutory or case substantiation.

Finally, with respect to this point, it must be observed that this Court has upheld the imposition of federal taxes on capital gains accruing prior to the date of the Sixteenth Amendment against a claim of unconstitutionality. Lynch v. Hornsby, 247 U.S. 339, 38 S.Ct. 543, 62 L.Ed. 1149 (1917). In that case, the federal government sought to tax dividends resulting from surplus assets accumulated from 1906, when purchased by the plaintiff, until 1915, when realized as income by the plaintiff. The Court, finding that the March 1, 1913, limitation of the Internal Revenue Code did not apply to this type of situation, permitted taxation of those dividends when realized, even though they were based on surplus accrued prior to not only the date of the statute but also prior to the Sixteenth Amendment, so long

as the income was realized after the adoption of the amendment. In reading the case, it is important to keep in mind that the Internal Revenue Act went into effect at substantially the same time as the Sixteenth Amendment and therefore accumulations prior to the act were also prior to the amendment. It is submitted that Lynch v. Hornsby, supra, is so closely analogous to the facts at bar as to be indistinguishable.

Appellants second contention amounts to an attack directly on the decision below as itself violative of due process. Appellants argue that they were deceived, that the decision appealed from retroactively changed the definition of income and rendered taxable what had always been understood to be nontaxable.

It has been pointed out before, and it must be repeated here, that the decision below in this case is in no way inconsistent with prior Florida decisions dealing with the meaning of income. Appellants can point to no authority which directly holds, or from which it may reasonably be inferred, that the word "income" in the Prohibition included unrealized capital appreciation. Indeed, as demonstrated above, the decisions of State v. Keller, supra, Owens v. Fosdick, supra, and Mahan v. Lummus, supra, while having no occasion to explicitly define income, treated the concept in a manner entirely consistent with the definition given to that term by the decision below. Without such authority, Appellants contention is frivilous. There is simply no authority upon which they can ground

their protestations of "justifiable reliance." If the Appellants were justified in relying on anything at all, it would have been in relying upon the commonly accepted definition of income with respect to capital gains, as used in virtually every federal and state case on the issue throughout the period when the Prohibition was in effect. That definition does not consider capital gain as income until realized.

This Court has recently dismissed an appeal and denied certiorari in a case seeking to challenge a state court decision as arbitrarily altering the law of the state. Esteva v. Boardman, 323 So.2d 259 (Fla. 1975) app. dism. & cert. den. 48 L.Ed.2d 791, 96 S.Ct. 2162 (1976). It is submitted that the instant appeal warrants the same disposition.

CONCLUSION

Wherefore, Appellee respectfully submits that this Court does not have jurisdiction to entertain either an appeal or certiorari in this matter and further that the question presented by this appeal is so unsubstantial as to warrant no further argument. Appellee respectfully moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Florida.

Respectfully submitted,

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